MICHAEL AND KAREN RODGERS

IBLA 94-509 Decided December 10, 1996

Appeal from a decision of the Eugene, Oregon, District Office, Bureau of Land Management, enforcing reclamation requirements and collecting damages for trespass. OR 48831.

Affirmed.

1. Trespass: Generally

Under 43 CFR 2920.1-2(a), any use, occupancy, or development of the public lands, other than casual use, without authorization, shall be considered a trespass. "Casual use" includes only short-term non-commercial activity. 43 CFR 2920-5(k). Where the record shows that unauthorized use (including running a driveway across and placing buildings on the lands, as well as planting lawn grasses and maintaining a lawn) continued for at least 18 months, it was not casual use. Even though the parties may have bought their lot under the belief that they owned the lands in question, their good faith is irrelevant to liability for trespass, but may be considered only as to whether the trespass was intentional.

2. Trespass: Measure of Damages

Anyone properly determined by BLM to be in trespass shall be liable to the United States for (1) the reimbursement of all costs incurred by the United States in the investigation and termination of a trespass; (2) the rental value of the lands for the time of the trespass; and (3) either rehabilitation of the lands harmed by the trespass or payment of costs incurred by the United States in so doing. Where a trespasser does not take issue with the details of BLM's assessment of liability, the assessment is properly affirmed.

3. Trespass: Generally--Trespass: Measure of Damages

Where Federally-owned lands are planted with lawn grasses and maintained as a lawn during unauthorized use, BLM may properly require a trespasser to rototill them in order to allow the recolonization of native plant species as part of its authority to require a trespasser to rehabilitate lands harmed by the trespass.

APPEARANCES: Michael and Karen Rodgers, pro sese.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Michael and Karen Rodgers (appellants) have appealed from the May 25, 1994, decision of the Eugene, Oregon, District Office, Bureau of Land Management (BLM), enforcing reclamation requirements and collecting damages for trespass.

BLM's record contains an initial report of unauthorized use dated July 13, 1993, including a memorandum indicating that a residential trespass onto Federally-owned, BLM-administered lands had been discovered during the cadastral survey of sec. 33, T. 16 S., R. 2 E., Willamette Meridian, Lane County, Oregon. The memorandum noted that the trespass consisted of a lawn, landscaping, a dirt road, and a small encroachment of a shed. A septic tank was also partially located under Federally-owned ground. The memorandum identified the owner of the adjacent lot as Michael Rodgers and indicated that the house on the lot was being rented out.

The record contains conversation records between BLM personnel and appellants in August and September 1993 indicating that the trespass was brought to their attention. They initially indicated that the current use of the trespass area existed when they purchased the property 22 years earlier and that they had a 300-foot easement with water from the creek. They disputed that the septic tank was on BLM-administered lands and defended their maintenance of the area, noting that they wished to reduce the fire hazard to their house. They apparently acknowledged that the lawn area had been used only for approximately 1-½ years. They noted that the use of the driveway had stopped.

BLM evidently investigated the trespass on August 18, 1993, and prepared an unauthorized use investigation report dated September 22, 1993, summarizing the facts, as set out above. The report set damages at $50 for 2-½ years ($125) and recommended the following corrective action in addition to collecting the rent for past use and administrative costs: "rototill the 0.3 acre trespass area and let the native vegetation reintroduce itself over time. Block off access to the county road by creating a ditch

or providing an obstruction to further use. Remove the woodshed extension so that it does not cross over the property line."

On November 3, 1993, BLM calculated its administrative costs at $257.68. On November 27, 1993, BLM completed an appraisal report estimating the fair market rental value of the land at $50 per year.

On December 13, 1993, BLM notified appellants that it had completed its investigation and concluded that there had been inadvertent unauthorized use of 0.3 acres of BLM-administered lands in violation of the Unlawful Occupancy and Enclosures Act, 43 U.S.C. §§ 1061, 1063 (1994), and 43 CFR 2801.3, 2920.1-1, 2920.1-2, 9239.2, and 9239.7. As a consequence, BLM stated, they were liable for fair market value rent of the public lands, rehabilitation/stabilization of the lands damaged by their actions, and administrative cost incurred by BLM. BLM prescribed the following conditions to correct the occupancy trespass, all to be completed within 120 days:

> 1. [B]lock off the access to the county road by creating a ditch or providing an obstruction which would deter further vehicle traffic across BLM land.
>
> 2. * * * [R]emove the woodshed extension so that it no longer crosses over the property line.
>
> 3. * * * [R]ototill the 0.3 acre unauthorized use area and allow the native vegetation to reintroduce itself over time.
>
> 4. * * * [P]ay the BLM $125.00 for past land rent and $257.68 administrative cost, totaling $382.68.

Appellants filed a response on January 27, 1994, stating as follows:

> Item #1[:] We have never used the [access] to the county [road] except once and when we were informed that you did not approve we discontinued using access and renters present have been informed so we do not feel it necessary to provide [an] obstruction[.]
>
> Item #2[:] [W]oodshed extension [has] been removed[.]
>
> Item #3[:] [W]e never did rototill the 0.3 acres in the past[. T]he only thing done was removed blackberries and mowed tall grass. We feel it will return to native vegetation without rototilling[.]

> Item #4[:] [W]ould ask you to forgive this debt in [lieu] of our [good] standing of 22 years and none of the above was done to provoke BLM or take advantage but more out of ignorance and when called to our attention we have been willing to comply.

In March 1994, a BLM inspector visited the site, noting that the County had graded a ditch making use of the old driveway very difficult, and that brush was starting to grow in the old driveway. He also noted that the woodshed extension had been removed, but that the grass area had not been rototilled and that, to the contrary, the renters were continuing to mow the grass.

BLM then issued the May 25, 1994, decision presently under appeal, which reiterated condition number 3, requiring rototilling of the 0.3-acre trespass site, and demanded payment of $368.68 for past rent and administrative charges. This appeal followed.

Appellants' statement of reasons states, in toto, as follows:

> We would like to appeal the charges of [$]368.68 for [trespassing]. We have been your neighbors for 23 years and did not realize we were [trespassing] and when it was called to our attention we complied to the changes requested except condition 3 which we feel is [unreasonable] and not logical in allowing the native [vegetation] to reintroduce itself. We never did rototill the area all we did was mow the grass for fire protection and remove the blackberries. Both of these will return back to native vegetation much faster if left alone. We ask you to forgive this debt as a good neighbor as any violation of [trespassing] was [done] in ignorance and it would put a financial burden upon us at this time.

[1] Under 43 CFR 2920.1-2(a), any use, occupancy, or development of the public lands, other than casual use, without authorization, shall be considered a trespass. There is no doubt that a trespass occurred here, as appellants (and their tenants) plainly occupied lands owned by the United States without authority of law. "Casual use" includes only short-term noncommercial activity. 43 CFR 2920.0-5(k). The record shows that the use cited by BLM continued for at least 18 months and therefore was not casual use.

Although appellants have asserted that they bought their lot in good faith under the belief that they owned the lands in question, they present nothing on appeal which would alter the fact that public lands were used without the appropriate authorization. Appellant's good faith is irrelevant to liability for trespass. See Oneida Indian Nation of New York State v. Oneida County, 719 F.2d 525, 541 (2nd. Cir. 1983), affirmed in part, reversed in part, County of Oneida, New York v. Oneida Indian Nation of

New York State, 470 U.S. 226 (1985), rehearing denied, 471 U.S. 1062 (1985); New York State Energy Resource Development Authority v. Nuclear Fuel Services, 561 F. Supp. 954 (W.D.N.Y. 1983); 87 C.J.S. Trespass § 5 (1954). Good or bad faith is relevant only in determining the measure of damages for which a trespasser is liable. BLM recognized that appellants' trespass was unintentional by assessing damages for nonwillful trespass.

[2] Anyone properly determined by BLM to be in trespass on Federally-owned lands shall be liable to the United States for damages, including the fair market value rental of the lands for the current year and past years of trespass, and the administrative costs incurred by the United States as a consequence of such trespass. 43 CFR 2920.1-2(a)(1) and (2). Further, the trespasser must rehabilitate and stabilize the lands that were the subject of the trespass or else face liability for the costs incurred by the United States in doing so. 43 CFR 2920.1-2(a)(3).

BLM therefore was authorized by Departmental regulations to collect the fair market value rental of the lands as well as administrative costs. Where a trespasser does not take issue with the details of BLM's assessment of liability, the assessment is properly affirmed. Double J Land & Cattle Co., 126 IBLA 101, 109 (1993).

[3] Further, BLM could properly direct appellants to rehabilitate and stabilize the lands that were the subject of the trespass. It is established that BLM may require action to bring the lands back to their pre-trespass condition. See Double J Land & Cattle Co., 126 IBLA at 109; Sharon R. Dayton, 117 IBLA 164 (1990); Clive Kincaid, 111 IBLA 224 (1989); Juliet Marsh Brown, 64 IBLA 379 (1982). BLM's direction to rototill the lands that were planted with lawn grasses and allow native plant species to recolonize the area was consistent with its authority to require rehabilitation of the lands, and it is specifically affirmed. 1/

We note that, as of the filing of this appeal, appellants had not complied with BLM's duly-authorized direction to pay rental and to rehabilitate the lands. We note that BLM may assess additional penalties for a trespass "not timely resolved," up to twice the fair market rental which has accrued for nonwillful trespass, not to exceed a total of 6 years. 43 CFR 2920.1-2(b)(1). Further, as noted above, a trespasser may be held liable for the costs incurred by the United States in rehabilitating lands where the trespasser fails to do so.

1/ We note that the question is not (as suggested by appellants) whether they ever rototilled the lands before. The purpose of requiring rototilling would be to accelerate the return of the land to its previous state by allowing native plant species to recolonize the area. Another purpose would plainly be to destroy the lawn that appellants (and their tenants) have been maintaining on the BLM-administered lands. Both purposes are consistent with BLM's authority to require rehabilitation of the lands.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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David L. Hughes
Administrative Judge

I concur:

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C. Randall Grant, Jr.
Administrative Judge